**STATE OF MICHIGAN**
**IN THE SUPREME COURT**
Appeal from the Michigan Court of Appeals
[Sawyer, P. J., Hoekstra and O'Brien, J.J.)

VANESSA OZIMEK,

Plaintiff-Appellant

vs.

LEE J. RODGERS,

Defendant-Appellee.

Supreme Court No. 154776
Court of Appeals No. 331726

Wayne County Circuit Court-Family
Div. Case No. 13-109046-DC

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# PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL BEFORE MOAA

**Jurisdictional Issue: Post-judgment appeal of right under MCR 7.202(6)(a)(iii)**

Proof of Service

**RELATED APPEALS**:

*Marik v Marik*, Supreme Court No. 154549

*Madson v Jaso*, Supreme Court No. 154529

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## ORDER BEING APPEALED

Plaintiff-Appellant Vanessa Ozimek appeals the Court of Appeals published decision after remand dismissing her appeal of right for lack of jurisdiction under MCR 7.202(6)(a)(iii). See Supplemental Appendix A, *Ozimek v Rodgers*, __ Mich App __ (August 25, 2016).

The underlying Opinion and Order entered by the trial court constitutes a post-judgment order affecting the custody of a minor under MCR 7.202(6)(a)(iii), and is a final order appealable by right. See Supplemental Appendix B, 2/8/16 Trial Court Opinion and Order.

## STATEMENT OF QUESTIONS INVOLVED

I. Does a post-judgment order addressing legal custody "affect" custody and is it a final order under MCR 7.202(6)(a)(iii) for purposes of filing an appeal of right and should the Court of Appeals decision be reversed where: the language of the court rule is broad; under long-standing federal and state law, including the Child Custody Act, custody includes physical and legal components and is Constitutionally protected; further

the *Ozimek* decision has sweeping effect; the trial court's order here affects the custody of a minor child; the Court of Appeals decision in Ozimek conflicts with other published cases; and the Court of Appeals treatment of theses cases is inconsistent and violates both due process and equal protection?

Appellant answers YES.

The Court of Appeals improperly dismissed the appeal of right in a published decision.

## SUPPLEMENTAL STATEMENT OF FACTS

Appellant relies on her Statement of Facts from her Application for Leave to Appeal.

## SUPPLEMENTAL ARGUMENT

A post-judgment order addressing legal custody "affects" custody and is a final order under MCR 7.202(6)(a)(iii) for purposes of filing an appeal of right. The language of the court rule is broad. Under long-standing federal and state law, including the Child Custody Act, custody includes physical and legal components and is Constitutionally protected.

The *Ozimek* decision has sweeping effect. The trial court's order affects the custody of a minor child. The Court of Appeals decision in *Ozimek* conflicts with other published cases. The Court of Appeals treatment of theses cases is inconsistent and violates both due process and equal protection

**Argument**:

### A. Federal Cases Recognize that Parental Decision-Making ("Legal" Custody) is a Fundamental Component of Custody Protected by the Constitution

The most fundamental right that exists in our society is that fit parents can make decisions concerning their children – all natural (including adoptive) parents, whether part of a two-parent family, divorced, or single, have this right. The United States Supreme Court has held that the care, custody and control of one's children comprise a fundamental natural and constitutional right. *Smith v Organization of Foster Families (OFFER)*, 431 US 815, 845, 97 S Ct 2094, 53 L Ed 2d 14(1977); *Stanley v Illinois*, 405 US 645, 651 (1972); *Santosky v Kramer*, 455 US 745, 758 (1982). See also *In re Clausen*, 442 Mich 658, 502 NW2d 649 (1993); *In re LaFlure*, 48 Mich App 377, 385, 210 NW2d 482, lv den 380 Mich 814 (1973)(right to the custody of his or

her children is an element of the "liberty" guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States).

In *Stanley*, 405 US at 651, the United States Supreme Court emphasized the paramount importance of the parent-child relationship:

> [T]he rights to conceive and to raise one's children have been deemed essential ... basic civil rights of man. and [r]ights far more precious ... than property rights. ... It is cardinal with us that the **custody, care, and nurture** of the child reside first in the parents. ... The integrity of the family unit has found protection in the Due Process clause of the Fourteenth Amendment, ... the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment ... (citations omitted).

In *Smith v OFFER*, 431 US at 845, the Court again emphasized that the parent-child relationship is recognized and protected under the Constitution:

> The individual's freedom to marry and reproduce is 'older' than the Bill of Rights ... [T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in the intrinsic human rights, as they have been understood in this Nation's history and tradition...

The natural parent-child liberty interest is derived from "blood relationship ... and basic human right." *Smith*, at 846.

As stated in *Franz v United States*, 707 F.2d 582 (D.C. Cir. 1983):

> It is beyond dispute that "freedom of personal choice in matters of family life is a fundamental liberty interest" protected by the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982). That freedom encompasses a wide variety of choices and activities: the decision to marry; procreation; the use of contraception; the decision not to carry a child to term; and cohabitation with members of one's extended family. Among the most important of the liberties accorded this special treatment is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship.

> **The constitutional interest in the development of parental and filial bonds free from government interference has many avatars. It emerges in a parent's right to control the manner in which his child is reared and educated and in the child's corresponding right not to have the content of his instruction prescribed by the state. It contributes heavily to a parent's right to direct the religious upbringing of his child.** And, above all, it is manifested in the reciprocal rights of parent and child to one another's "companionship." [footnotes omitted]. *Franz* at 594-595 (emphasis added).

The Supreme Court more recently addressed the scope of the fundamental parental liberty interest in *Troxel v Granville*, 530 US 57, 120 S. Ct. 2054 (2000):

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.,* at 535. We returned to the subject in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166.
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e. g., Stanley v. *Illinois,* 405 U. S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); *Wisconsin* v. *Yoder,* 406 U. S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their

> children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham* v.*J. R.,* 442 U. S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. *Kramer,* 455 U. S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

*Troxel* recognized and protected a parent's fundamental right to make associational decisions for his or her children and applied Constitutional protections to a single parent. There is nothing in the inherent and Constitutionally protected parent-child relationship that limits that right or its protection to two-parent families. The right is intact for all fit parents and their children. See e.g. *Rust v Rust*, 846 SW2d 52, 56 (Tenn. Ct. App 1993)(single-parent family unit entitled to similar measure of constitutional protection concerning governmental intrusion as accorded intact two-parent family). When the state enters an order affecting a parent's right to make the important decisions concerning a child (i.e. educational, religious, or associational decisions), the state order *affects* custody and the life of the child.

*Troxel*, and the cases discussed in *Troxel*, acknowledge the broad scope of parental custody. The fundamental parental liberty interest includes directing and

controlling the important aspects of raising a child – choices concerning education, schools, religion, and association – which go to the core of being a parent. These are the decisions that are soundly within the realm of family privacy and choice and make up the unique foundation for each family.

B. **Michigan Law Recognizes the Complex Make-up of Custody**

As discussed in Appellant's Application for Leave to Appeal, child custody is governed by the Child Custody Act, MCL 722.21, *et seq*. Any order under the Act is by definition an order affecting child custody.

Appellant adopts the arguments also made by the Appellant in *Marik v Marik*, Supreme Court No. 154549.

The focus by plaintiff and the Court of Appeals in *Ozimek v Rodgers*, ___ Mich App ___, ___ NW2d ___ (COA No. 331726, 08/25/16) on "physical custody" as the only form of custody is misplaced. The panel in *Ozimek* correctly asserted that this Court's 1994 amendment intended to limit claims of appeal to postjudgment orders affecting custody. Where *Ozimek* goes astray is its unsupported conclusion that this Court's definition of custody under MCR 7.202(6)(a)(iii) means only physical custody is included in the type of custody orders appealable by right. Nothing in MCR 7.202(6)(a)(iii) or the Child Custody Act, MCL 722.21 *et seq*, supports so narrow a view of the term custody.

**No Actionable School Change Dispute Without Legal Custody:** A school change dispute such as exists here is an issue for court determination only where parents share legal custody. If a parent has sole legal custody, that parent

decides all ***important*** issues concerning the child.[1] The other parent, if aggrieved by a decision of the sole legal custodian, has no remedy in court - other than to seek a share of legal custody if he or she can satisfy the requisite threshold [2] and burden of proof.[3] A parent without legal custody, but who exercises parenting time, may decide only ***routine*** matters when the child is in his/her care. MCL 722.27a(11). Custody (the joint legal variant) is the essential precondition for a dispute such this to even reach the court for determination.

**No Hierarchy of Custody Types:** There is no basis for the position advocated by the panel in *Ozimek* that there is a hierarchy of types of custody that renders physical custody decisions more important than those involving legal

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[1] There is a general consensus in Michigan case law – consistent with the federal cases – that important issues are those involving education, health care treatment, and religious upbringing. *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), *aff'd on other grounds*, 486 Mich 81; 782 NW2d 480 (2010); *Wellman v Wellman*, 203 Mich App 277; 512 NW2d 68 (1994); *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993); *Nielsen v Nielsen*, 163 Mich App 430; 415 NW2d 6 (1987); *Arndt v Kasem*, 156 Mich App 706; 402 NW2d 77 (1986); and *Fisher v Fisher*, 118 Mich App 227; 324 NW2d 582 (1982).

2 In *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), it was held that the existence of proper cause or a change of circumstances is a threshold matter in any consideration of a change to a prior custody order. The movant has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists before the trial court can proceed with a custody hearing. Nothing in *Vodvarka* limited application of this threshold only to physical custody changes.

[3] If the *Vodvarka* custody modification threshold is satisfied and a hearing is authorized, the court's next obligation is to determine if there is an established custodial environment and, if so, whether the proposed change would disrupt that environment. MCL 722.27(1)(c). *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000); *Ireland v Smith*, 214 Mich App 235; 542 NW2d 344 (1995), *aff'd*, 451 Mich 457; 547 NW2d 686 (1996); *Blaskowski v Blaskowski*, 115 Mich App 1; 320 NW2d 268 (1982).

custody, or that one is more deserving of final order status than the other. The joint custody section of the Child Custody Act, MCL 722. 26a, in subsection (7), defines joint custody as including one or both of the following arrangements:

> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

MCL 722.26a(7).

Under this statutory scheme, shared decision-making ("legal custody") on important decisions affecting the child is "custody." It is no less "custody" than alternating periods of residence ("physical custody"). The panel in *Ozimek* cited no authority for its claim that this Court intended the term "custody" in MCR 7.202(6)(a)(iii) to mean only disputes under MCL 722.26a(7)(a) (aka "physical custody), but not disputes under MCL 722.26a(7)(b) (aka "legal custody"). Under the statute, these are co-equal forms of child custody. As will be explained below, in several ways, legal custody (shared decision making) is more crucial to the exercise of constitutionally protected parental rights than is the exercise of physical custody (alternating periods of residence).

**Appeals by Right Historically Allowed from Legal Custody Disputes Including Those Involving School Enrollment:** The joint custody statute (MCL 722.26a), the only section in the Act that attempts to distinguish between physical custody (alternative periods of residence) and legal custody (shared decision making on important matters) took effect January 14, 1981. For more than a decade before

the 1994 amendment to MCR 7.202 restricting appeals by right in post-judgment domestic relations cases, appeals from physical custody and legal custody decisions were treated identically. After the 1994 amendment to the final order rule, identical treatment of legal custody and physical custody appeals continued, suggesting that the Court of Appeals viewed the term "custody" in the rule to mean legal or physical custody. Appeals by right were recognized from orders affecting legal custody, including orders granting or denying motions to resolve disputes between joint legal custodians over where the children attend school.

As set out in Appellant's application, the litany of cases where the Court of Appeals permitted appeals by right from orders deciding school enrollment disputes between joint legal custodians include *Lombardo v Lombardo*, 202 Mich App 151; 507 NW2d 788 (1993) [the seminal case addressing school enrollment disputes between parents with joint legal custody was heard as an appeal by right]; *Parent v Parent*, 282 Mich App 152, 153; 762 NW2d 553 (2009) [appeal of right from a post-judgment order granting a motion to enroll child in public school in a dispute between joint legal custodians]; *Pierron v Pierron*, 282 Mich App 222; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010) [an appeal of right from a post-judgment order maintaining children in their current district with joint legal custodians who cannot agree].

With these and many similar cases where appeals by right were allowed to proceed, most of which are unpublished, it was implicitly recognized by the Court of Appeals that an order granting or denying a parent's motion related to school

enrollment inherently affects that parent's custody rights. It is not legally significant that the category of custody affected is shared decision-making under MCL 722.26a(7)(b) instead of alternating periods of residence under MCL 722.26a(7)(a). No provision in any relevant statute or court rule draws a distinction or creates a hierarchy between the two type of custody. Neither plaintiff nor the panel in *Ozimek* was able to cite any authority for their view that only physical custody is "real custody" while legal custody is relegated to a second-class status not worthy of resulting in a final order appealable by right.

**Legal Custody is "Real" Custody:** The view espoused by the *Ozimek* panel that legal custody isn't "real custody" is contrary to the way the law has developed in the decades since adoption of the Child Custody Act and since this Court amended MCR 7.202(6)(a)(iii) in 1994.

In the years following this Court's amendment of the final order rule to exclude non-custody postjudgment orders from the definition of final orders appealable by right, the view of what types of order "affect custody" was gradually expanded through decisions of this Court or of the Court of Appeals. Several types of orders, including those not directly "changing" custody were held to "affect" custody for purposes of triggering an appeal by right under the final order rule.

After the 1994 amendment, it was common for the Court of Appeals to administratively dismiss for lack of jurisdiction appeals from change of domicile orders. However, as had become apparent over the years, such orders nearly always affect custody. Even if a change of domicile does not change the child's established

custodial environment (a concept distinct from a custody order [4]) under MCL 722.27(1)(c), it "affects" custody.

The first of these was *Thurston v Escamilla.* A claim of appeal was filed from a trial court order changing domicile of a minor child. The Court of Appeals, in COA No. 250568, administratively dismissed the appeal:

> …because the August 12, 2003 order is a post judgment order that does not affect the custody of a minor MCR 7.202(7)(a)(I), 7.203(A)(1), and 7.202(7)(a)(iii). Domicile is not custody. As a result, appellant may challenge the order in question by filing a delayed application for leave to appeal under MCR 7.205. See MCR 7.203 (B)(1).

*Thurston v. Escamilla*, COA No. 250568, Order dated September 10, 2003.

On application to this Court, in an order dated February 27, 2004, this Court reinstated the appeal and remanded to the Court of Appeals for plenary consideration, stating:

> On order of the Court, the application for leave to appeal the September 10, 2003 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE the September 10, 2003 order of the Court of Appeals and we REMAND this case to the Court of Appeals for plenary consideration. The divorce judgment awarded joint legal and physical custody to both parties, and there was, in fact, an established joint custodial environment under which defendant had nearly daily contact with the children. The August 12, 2003 order of the Saginaw Circuit Court granting plaintiff's motion for change of domicile does not mention a change of custody, but by permitting the children to be removed by plaintiff to the State of New York, the order is one "*affecting* the custody of a minor…" within the meaning of MCR 7.202(7)(a)(iii)

[4] A custody order, by itself, does not establish a custodial environment. *Bowers v Bowers*, 198 Mich App 320; 497 NW2d 602 (1993). Whether an established custodial environment exists is purely a question of fact to be resolved irrespective of the existence of a custody order, the lack of a custody order, or the violation of a custody order. *Blaskowski v Blaskowski*, 115 Mich App 1; 320 NW2d 268 (1982).

> [emphasis supplied]. See also MCL 722.31. Therefore, the August 12, 2003 order is final, and appealable by right. MCR 7.203(A)(1).
>
> We do not retain jurisdiction.

*Thurston v. Escamilla*, 469 Mich 1009, 677 NW2d 28 (2004).

With this order, the Court established the rule that a postjudgment order does not need to "change" custody for it to "affect" custody and therefore be appealable by right. In *Thurston v Escamilla*, this Court recognized the parties shared joint legal and joint physical custody of the child. There was no indication which form of custody this Court thought was "affected" by the change of domicile order. Nor was there a statement that physical custody is the only form of custody that mattered for purposes of "affecting custody." When domicile is changed, both aspects of custody are "affected." Where the child physically resides is obviously affected. But so are decisions affecting major matters affecting the child, such as where the child goes to school, which health care providers the child sees, and which church the child attends.

Next was whether an order denying a request for change of physical custody of a child "affected custody" so as to be appealable by right. The Court of Appeals addressed this question in *Wardell v Hincka*, 297 Mich App 127, 822 NW2d 278 (2012). In that case, it was recognized that orders ***denying*** as well as granting a change of custody are orders "affecting custody of a minor." Because they ***affect*** custody even if they don't ***change*** custody, they are appealable by right.

The *Wardell v Hincka* panel stated:

> MCR 7.202(6)(a)(iii) carves out as a final order among postjudgment orders in domestic relations actions those that affect the custody of a minor, not those that "change" the custody of a minor. As this Court's long history of treating orders denying motions to change custody as orders appealable by right demonstrates, a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is. We interpret MCR 7.202(6)(a)(iii) as including orders wherein a motion to change custody has been denied.

*Wardell v Hincka*, *supra*, 297 Mich App at 132-133. Affect does not mean "alter."[5]

A decade after *Thurston v Escamilla*, the Court of Appeals also closed the circle on the question of whether orders ***denying*** rather than ***granting*** a change of domicile similarly "affect custody" and are therefore final orders appealable by right. In *Rains v Rains*, 301 Mich App 313; 836 NW2d 709 (2013), it was acknowledged that since *Wardell v Hincka*, *supra*, it was recognized that orders ***denying*** as well as granting a change of custody are orders "affecting custody of a minor." Because they ***affect*** custody even if they don't ***change*** custody, they are appealable by right.

Therefore, consistent with its prior decision in *Wardell*, the *Rains* court held that orders denying a change of domicile, even if when they leave the status quo fully in place and don't alter custody, parenting time, or place of residence, are still orders "affecting custody" under MCR 7.202(6)(a)(iii). As stated by the Court of

[5] This Court defined "affect in another context under the No-fault Act as including "to have an influence on..." *McCormick v Carrier*, 487 Mich 180 (2010). A court's decision concerning legal custody or making a determination concerning custodial decisions has an "influence" on that parent's custodial rights and on what happens to a child.

Appeals in *Rains*, "a trial court need not ***change*** a custodial arrangement in order for its decision to ***affect*** custody." *Rains*, *supra*, 301 Mich App at 323. [Emphasis added.]

**The *Ozimek* decision conflicts with other Court of Appeals decisions and orders**: Orders granting or denying grandparenting time (formerly grandparent visitation) also presented the issue of whether they "affect custody" and are therefore final orders appealable by right. For more than a decade after the 1994 amendment to the final order rule, the Court of Appeals sometimes administratively dismissed for lack of jurisdiction appeals by right from grandparenting time orders.

Examples of this treatment were the initial dismissal of claims of appeal filed from two grandparenting time orders is *Varran v Granneman*. In two separate but related appeals, COA Nos. 321866 and 322437, the Court of Appeals entered orders of administrative dismissal, stating in 321866: [6]

> The claim of appeal is DISMISSED for lack of jurisdiction because the order dated April 25, 2014 and entered in the circuit court register of actions on May 1, 2014 is not a final order appealable of right. MCR 7.202(6)(a); MCR 7.203(A). That order is not a final order under MCR 7.202(6)(a)(iii) because it is not an order affecting custody within the meaning of that court rule provision. MCR 7.202(6)(a)(iii), which is directed at postjudgment orders in domestic relations actions, must reasonably be considered to use the term "custody" as it is used in Michigan domestic relations law and, thus, cannot reasonably be considered to extend to orders that merely allow parenting or grandparenting time without affecting custody under our domestic relations law. *See, e.g., Pierron v Pierron*, 486 Mich 81, 85-86; 782

6 A substantially similar order of administrative dismissal was entered in No. 322437.

> NW2d 480 (2010) (discussing that adjustments to parenting time do not necessarily affect established custodial environment). This is true regardless of whether the May 1, 2014 order might affect custodial rights as discussed in constitutional case law. At this time, appellant may seek to appeal the May 1, 2014 order by filing a delayed application for leave to appeal under MCR 7.205(G).

Particularly striking in both dismissal orders was the statement that MCR 7.202(6)(a)(iii) must "must reasonably be considered to use the term 'custody' as it is used in Michigan domestic relations law…." Yet the order contained no discussion of how the term "custody" is used in Michigan domestic relations law - or even whether there was a single definition of the term "custody."

As noted, the Child Custody Act, has two authorized uses of the term custody, both of which are found in the joint custody statute, MCL 722.26a(7). The first is based on physical residence and the second is based on decision-making on important matters affecting the welfare of the child. It should have been difficult for the Court of Appeals to conclude that grandparenting time is not an important matter affecting a child's welfare implicating MCL 722.26a(7)(b).

This Court was asked to review the administrative dismissals and vacated both orders. The Court of Appeals was instructed on remand to determine "whether an order regarding grandparenting time may affect custody within the meaning of MCR 7.202(6)(a)(iii), or otherwise be appealable by right under MCR 7.203(A)." *Varran v Granneman*, 497 Mich 928; 856 NW2d 555 (2014); *Varran v Granneman*, 497 Mich 929; 856 NW2d 555 (2014).

On remand, the Court of Appeals cited and quoted from the definition of

"custody" in *Black's Law Dictionary* (10th ed) and concluded that custody involves "legal custody (decision-making authority) and physical custody (caregiving authority)" *Varran v Granneman*, 312 Mich App 591, 604; 880 NW2d 242 (2015). Also cited was this Court's decision in *Grange Ins Co of Mich v Lawrence*, 494 Mich 475; 835 NW2d 363 (2013), which recognized both legal custody and physical custody.[7]

Of critical importance because of its bearing on the instant case, the *Varran* panel stated:

> We recognize that the Michigan cases thus far addressing MCR 7.202(6)(a)(iii) have addressed physical custody and have thus focused their inquiries on the effect of the challenged order on where the child would live. It would thus be tempting to conclude that this Court rule only comes into play when the physical custody of a child is at issue. Although there is a distinction between physical and legal custody, ***MCR 7.202(6)(a)(iii) contains no distinguishing or limiting language.*** Based on the plain language of the terms used in MCR 7.202(6)(a)(iii) then, a "postjudgment order affecting the custody of a minor" is an order that ***produces an effect on or influences in some way the legal custody*** or physical custody of a minor. [Emphasis added.]

*Varran*, *supra*, 312 Mich App at 604. The *Ozimek* panel, although citing

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[7] In *Grange Ins. Co v Lawrence*, 494 Mich 475, 507-509, 835 NW2d 363 (2013), this Court discussed MCL 722.26a)(7), recognizing the dual aspects of custody – both physical and legal. *Grange* involved a determination of a child's domicile for purposes of the No-Fault Act. As part of determining domicile, the Court analyzed parental custody and related orders under the Child Custody Act:

> "In directing courts to abide by the custody order, we are cognizant that the Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically "reside," whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare." *Id.* at 511.

*Varran* briefly for the proposition that rules of statutory construction apply to interpretation of court rules, never directly confronted the above language. It is language which cannot be rationally reconciled with its decision in *Ozimek* that an order also implicating a major decision affecting children is not appealable by right.

As mentioned in Appellant's application for leave to appeal, after this Court remanded *Ozimek* to the Court of Appeals, the Court of Appeals panel should have recognized that its subsequent decision limiting the term "affecting custody" in the final order rule to "physical custody" conflicted with its prior holding in *Varran*. A conflict resolution panel should have been convened under MCR 7.215(J) because a "panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court." [8]

*Ozimek* cannot be reconciled with or meaningfully distinguished from *Varran*. If an order "produces an effect on or influences in some way the legal custody," it is a final order appealable by right. Denying a parent the choice of where to send his/her children to school affects custody. The *Ozimek* panel was bound to follow *Varran* or declare a conflict under MCR 7.215(J). It did neither.

### C. Legal Custody is a Fundamentally Important Right for Both Parents and Children

Parental rights mean very little unless that parent has legal custody. Having

[8] The recently released unpublished opinion of *Hoskins v Hoskins*, discussed *infra* at 20-21, acknowledges this conflict.

legal custody determines whether a parent may assert not only his/her rights to care, custody, and control of his/her children, but also whether the parent may assert right on behalf his/her child.

In *Elk Grove Unified School District v Newdow*, 542 US 1 (2004), a father who shared physical custody with the mother, but who lacked legal custody (in California, as in Michigan, defined as shared decision making on important issues affecting the child's welfare), had no legal standing to challenge the constitutionality of a statute requiring his daughter to recite the pledge of allegiance at school. A parent without legal custody is a parent whose parental rights are substantially degraded. Therefore an order affecting legal custody implicates fundamental rights and should not be relegated to second-class status. Like an order affecting physical custody, it should be appealable by right.

Michigan law also places considerable importance on having legal custody. MCL 722.31, also part of the Child Custody Act, provides that the rules governing a change of a child's legal residence (aka change of domicile) do not apply if the relocating parent has sole legal custody. As stated in MCL 722.31(2), "This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents."

As a practical matter, it means that a parent without a share of legal custody is effectively powerless to prevent the other parent from removing the child from Michigan and relocating across the country or around the world. Before granting a

change of domicile to a parent with sole legal custody, a court need not (and must not) apply the so-called *D'Onofrio* factors codified in MCL 722.31(4). *Spires v Bergman*, 276 Mich App 432; 741 NW2d 523 (2007).

Application of the MCL 722.31(4) factors would otherwise mandate consideration of, among other things, whether "it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent." Lacking a share of legal custody can result in a near complete severing of the parent child relationship due to a change of domicile because no consideration of the impact on parenting time is required.

Similarly, for a period of time after this Court's decision in *In re AJR*, 496 Mich 346; 852 NW2d 760 (2014), having a share of legal custody of one's child fully shielded a parent against termination of his/her parental rights in a stepparent adoption proceedings. This was true even if the parent sharing legal custody had been absent from the child's life and failed to pay support for the two-year period specified in the statute as authorizing termination of rights. MCL 710.51(6)

The loss of legal custody fundamentally affects parents and children.

D. **The Court of Appeals interpretation of MCR 7.202(6)(a)(iii) in *Ozimek* violates Due Process and Equal Protection**.

The right to appeal does not exist at common law. *Ritzer v Ritzer*, 243 Mich 406, 412, 220 NW 812 (1928). However, once appellate review is granted, it must

comply with due process and equal protection. *Griffin v Illinois*, 351 US 12, 18; 76 S Ct 585; 100 L Ed 891 (1956);[9] *Ross v Moffit*, 417 US 600, 611; 94 S Ct 2437; 41 L Ed 2d 341 (1974). Unfairness results if a party is denied meaningful access to the appellate system (*Ross* at 611), or if denied an appeal for arbitrary or capricious reasons. *Lindsey v Normet*, 405 US 56, 77; 92 S Ct 862; 31 L Ed 2d 36 (1972)(when an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others).

Since the release of *Ozimek*, the Court of Appeals has dismissed a number of appeals of right from post-judgment orders addressing legal custody issues (including school/educational disputes between joint legal custodians as well as dismissing appeals of right from post-judgment orders either granting or denying modifications of joint or sole legal custody). In *Reimer v Johnson*, COA No. 334934, 10/5/2016, the Court of Appeals dismissed for lack of jurisdiction a post-judgment order changing joint to sole legal custody (physical custody remained the same). In *Voss v Voss*, COA No. 335007, 10/5/ 2016, the Court of Appeals – on the same day as

[9] As stated in *Griffin, supra*, 351 US at 77, "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e. g., *McKane v. Durston*, 153 U.S. 684, 687-688. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See *Cole v. Arkansas*, 333 U.S. 196, 201; *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208; *Cochran v. Kansas*, 316 U.S. 255, 257; *Frank v. Mangum*, 237 U.S. 309, 327."

*Reimer* – dismissed a post-judgment order affecting legal custody of a child based on *Ozimek*. See *Reimer* and *Voss*, attached as Supplemental Appendices C and D, respectively.

*Ozimek* has created confusion in the Court of Appeals. In *Hoskins v Hoskins*, Court of Appeals no. 334637, (unpublished, March 16, 2017), the trial court changed post-judgment the children's school and substantially increased one parent's parenting time without a hearing, and without giving consideration to the children's "best interests." See *Hoskins*, attached as Supplemental Appendix E, The claim of appeal (filed September 9, 2016 *after* the *Ozimek* decision) was not dismissed. Many months later, the Court of Appeals denied Appellee's motion to dismiss (filed December 16, 2016) without prejudice to allow the parties to raise the issue in front of the panel.

On March 16, 2017, the panel in *Hoskins* reversed and remanded to the lower court based on parenting time only. *Hoskins* found jurisdiction over parenting time, but not the portion of the order affecting legal custody. In footnote 2, the panel did note the inconsistency between *Ozimek* and *Varran* concerning the effect on legal custody:

> We are cognizant that this Court recently made a contrary statement—that the court rule's reference to "custody" should be read to only relate to *physical* custody. *Ozimek v Rodgers (On Remand)*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket No. 331726); slip op, p 6, lv pending. However, *Ozimek*, like us, was bound by our prior decision in *Varran.* MCR 7.215(J)(1). Consequently, we do not believe we are bound by *Ozimek*'s determination.

This comment reinforces that there should have been a conflict panel concerning the jurisdictional issue. See pgs. 15-16, *supra.*

The *Hoskins* panel continued, however, to find that when both parents have legal custody the State - when it decides a contested legal custody issue - does not interfere with a parent's legal custody:

> "Clearly, when a court resolves such a dispute or "stalemate" between two parents who hold joint legal custody of a child, it does not interfere with or override a parent's legal right because neither parent has the authority to unilaterally make such decisions. Therefore, because the court's order related to which school the children should attend did not affect physical nor legal custody, this portion of the order is not appealable by right." Slip Op. p. 5.

But this premise is not correct. The State does negate the decision of one of the parents and this does affect the core of legal custody – a parent's decision making. It also affects the child in terms of the outcome of the decision. The State - whether the parents agree to joint legal custody or whether a divorce judgment or order has imposed it – makes a decision overriding one or the other parent's decision and decision-making authority.[10] If adopted, *Hoskins*' approach means that neither parent has a right as between the parents. The State is inserted as – ultimately – *the* parental decision maker and its decision inherently "affects" custody. Parental

[10] These decisions can affect a child in myriad ways depending on the case. The State is involved in marriage and divorce. Even parental agreements for custody, legal or physical, are subject to court approval and become an order of the court, not merely a contract between the parents, differing significantly from arms-length financial agreements. See *Harvey v Harvey*, 470 Mich 186, 189, 680 NW2d 835 (2004) (paramount duty of trial court under the Child Custody Act to ensure the best interest of children even in cases of parental custody agreements).

decision-making on important issues such as education is an integral part of custody.

The Court of Appeals, however, does not *uniformly* dismiss such appeals and there are recent opinions treating post-judgment orders concerning legal custody as appeals of right. See e.g. *Duhl v Ladomer*, Mich Ct App No. 334307, March 14, 2017 (per curiam, unpublished, addressing on the merits a post-judgment order modifying legal custody and parenting time as an appeal of right). Supplemental Appendix F.

This lack of consistency concerning denials of an appeal of right and access to the courts concerning fundamental custodial rights amounts to the arbitrary treatment condemned in *Lindsey, supra*, and constitutes a violation of due process. See *Troxel, supra.* There is a deleterious effect on citizen confidence in the Michigan jurisprudence when parties and their attorneys cannot predict whether they have an appeal of right and see the system as arbitrary.[11]

Due process and equal protection analyses are substantially related. At the heart of the Fourteenth Amendment's Equal Protection clause is the principal that all persons similarly situated should be treated alike. *City of Cleburne v Cleburne Living Center*, 473 US 432, 439; 105 S Ct 3249; 87 L Ed2d 313 (1985); *Wolff v Moore*,

[11] The argument that an application for leave to appeal is a better approach in these cases is simply wrong. There is no guarantee of review on the full record. In this case, the Court of Appeals denied the delayed application for leave to appeal filed under MCR 7.205(G)(5) on February 8, 2017. (Judge Stephens, would have held the application in abeyance pending this Court's decision). Appellant will now be filing another application with this Court - another burden on parents (as discussed in *Troxel*). With an appeal of right, there is a guaranteed review, transcripts can be expedited when necessary, and an Appellant can request peremptory reversal, a stay, or other immediate action when appropriate. An application is a lesser remedy than an appeal of right.

104 F Supp2d 892, 893-894 (2000). Classifications promulgated by the State are challenges to the concept of equal treatment. Classifications burdening fundamental rights are subject to strict scrutiny analysis. *Id*. At 440, 105 S Ct 3249. See also *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed2d 465 (1988).

Here, parents challenging post-judgment legal custody issues who are similarly situated are not treated the same (the arbitrary treatment discussed above). Some appeals are dismissed, others are not. There is no reason supporting any differential treatment. The parents whose appeals of right are dismissed have been deprived of both due process and equal protection.

Additionally under an equal protection analysis, the Court of Appeals in *Ozimek* has created a classification or custodial hierarchy – valuing physical custody as more important or significant than legal custody. There is no distinction or hierarchy listed in MCR 7.202(6)(a)(iii) or under the Child *Custody* Act (which includes all types of custody and parenting time). And the *Ozimek* decision does not offer a compelling State reason for such a distinction. Fit parents (and their children) who have a protected liberty interest in all the aspects of custody (physical and decision-making) are deprived of an appeal of right concerning legal custody, but not physical custody.

Even applying a less stringent rational basis test for the classifications in the rule results in the same conclusion. Classifications that burden neither a fundamental right nor target a suspect class will be upheld so long as they bear a

rational relationship to a legitimate objective. *Romer v Evans*, 517 US 620, 631; 116 S Ct 1620; 134 L Ed2d 855 (1996); *Heller v Doe*, 509 US 312, 319-320; 113 S Ct 2637; 125 L Ed2d 257 (1993)." The *Ozimek* panel inserts its own judgment concerning custodial hierarchy – but does not and cannot support that judgment based on either federal or state law or generalized and speculative concern about the court docket. See *Adams v Adams*, 100 Mich App 1, 14, 298 NW2d 871 (1980)(findings must be established by record evidence, not based on allegation, speculation, mere conclusions).

**CONCLUSION**: The right and privilege to make important decisions on behalf of one's child is central to the custodial rights recognized under the long line of Constitutional cases as well as Michigan law. We are defined by the choices we make. And to a great extent, we are defined by the choices our parents have made for us. Parental decision-making concerning educational issues are the fundamental decisions that affect child custody and the lives of children.

It is time for a definitive construction of MCR 7.202(6)(a)(iii). Appellant (and other parties) have had to address jurisdictional uncertainty resulting in an expensive and confusing appellate process. The Court of Appeals created its own, limited definition of custody for purposes of the court rule contrary to established law and Constitutional definitions of custody. The February 8, 2016 Opinion and Order comes within MCR 7.202(6)(a)(iii). It is a final order appealable by right. MCR 7.203(A)(1).

## RELIEF REQUESTED

Plaintiff-Appellant respectfully requests that this Court reverse the decision in *Ozimek v Rodgers*, find that "legal" custody (parental decision-making) falls within MCR 7.202(6)(a)(iii), and order the Court of Appeals to take this appeal as an appeal of right.

Respectfully submitted,

***/s/ Anne Argiroff***

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**Dated**: March 17, 2017

## PROOF OF SERVICE

On the date below, a copy of this Supplemental Brief was served on Defendant-Appellee at the address of his counsel by first-class mail and at his address: 18143 Mulberry St Riverview, MI 48193.

***/s/ Anne Argiroff*** **Dated**: March 17, 2017